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January 5, 1994

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N. W.  
Washington, D. C. 20554

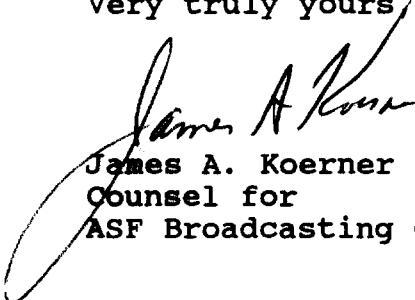
Re: MM Docket 93-107

Dear Mr. Caton:

On behalf of ASF Broadcasting Corporation, an applicant in the above-referenced proceeding, there are transmitted herewith an original and 11 copies of its Reply to Exceptions.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,

  
James A. Koerner  
Counsel for  
ASF Broadcasting Corporation

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FEDERAL COMMUNICATIONS COMMISSION  
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In re Application of  
DAVID A RINGER, et al.

) MM Docket No. 93-107  
) File Nos. BPH-911230MA

For Construction Permit for  
New FM Station on Channel 280A  
at Westerville, Ohio

)  
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)  
)

TO: The Review Board

REPLY TO EXCEPTIONS

James A. Koerner, Esquire  
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January 5, 1994

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	i
Argument	1
ASF's Structure is Not Suspect	1
Mr. Beauvais' Interest is Non-Cognizable	3
Conclusion	5

TABLE OF AUTHORITIES

	<u>Page</u>
Attribution of Ownership Interests, 97 FCC 2d 997 (1984) <u>recons.</u> 58 RR 2d 604 (1985)	3,4
Bechtel v. FCC, No. 92-1378 (D.C. Cir., December 17, 1993)	5

### ARGUMENT

ASF Broadcasting Corporation ("ASF") will not attempt to respond to each and every criticism levelled by its opponents in their Exceptions. This does not mean, however, that ASF concedes the accuracy of their arguments. Instead, ASF will reply to the charges that its two-tiered structure is strange and unnatural and that the interest of its non-voting shareholder should be counted for diversification or integration purposes.

### ASF'S STRUCTURE IS NOT SUSPECT

In all too many two-tiered situations, the scenario is the same. An experienced broadcaster with other broadcast interests, and none of the desirable comparative traits, wishes to apply. Obviously, his application has little or no chance of success, absent disqualification of all other applicants. So, he finds a local resident, almost always a complete stranger, without broadcast interests -- or generally even broadcast or business experience -- and with the comparatively desirable traits. He then proposes a scheme, usually a limited partnership, whereby the local resident is the sole general partner and the experienced broadcaster is the "insulated" limited partner. The limited partner is essentially able to "control" the general partner through the use of the limited partner's attorney and engineer, not to mention the general partner's lack of business expertise.

Typically also, the general partner receives his or her share as "sweat equity" or for payment of a nominal sum. This "giving away the store" is what makes such situations suspect.

ASF's situation is nearly the complete reverse. Ardeth Frizzell had years of broadcast experience, most recently at the very station which would be the subject of the application. This included management. However, she needed someone to bankroll her. A former co-worker and close friend had previously filed an application and successfully prosecuted it through a comparative hearing with the financial assistance of Thomas Beauvais, whom the friend knew quite well for many years. Ms. Frizzell and Mr. Beauvais met each other, each highly recommended to the other by a trusted and long-time friend. Given the fact that each is experienced, there is no need to waste time on matters that a bank or total stranger would be interested in, such as a business plan. He knew she had experience managing this station; she knew he was familiar with broadcasting and with what she wanted to do.

After reaching basic agreement, she forms a corporation - using her attorney -- of which she is sole voting shareholder with 25% equity. She agrees to put in \$12,000. Mr. Beauvais will put in \$96,000 as capital, and would get 75% of the equity. Mr. Beauvais would also lend additional money. Ms. Frizzell's payment for her stock is hardly a pittance. Significantly, in addition, she has the right to buy out Mr. Beauvais' equity interest, but he has no reciprocal right.

Mr. Beauvais is essentially an equity capital lender whose borrower came to him highly recommended by a friend. He had been in that role before.

The factual situation here presents none of the "give away the store" attributes frequently found in comparative proceedings. The arrangement makes good business sense for both parties. To call this relationship strange and unnatural is to condemn all two-tiered applicants -- something the Commission has yet to do.

**MR. BEAUVAIS' INTEREST IS NON-COGNIZABLE**

When the Commission refined its attribution rules, it originally held that limited partnership interests would be non-cognizable if the partnership agreement complied in all significant respects with the Revised Uniform Limited Partnership Act (RULPA). Attribution of Ownership Interests, 97 FCC 2d 997 (1984), recons. 58 RR 2d 604 (1985). Non-voting stock interests, of course, were also non-cognizable. A number of petitions for reconsideration pointed out that, under RULPA, limited partners had certain rights similar to voting stockholders in a corporate setting. Accordingly, in acting upon those petitions, the Commission recognized "that a limited partnership is a distinct form of business association with unique characteristics that justify this differential treatment of limited partnership interests for attribution purposes." 58 RR 29 at 614 (footnote omitted).

The Commission found it necessary to prescribe special limitations on limited partnerships because of the wide latitude and broad flexibility to grant (or withhold) powers to limited partners. Id. This is what differentiates limited partnership interests from those which are automatically exempt from attribution, e.g., non-voting stock. The differential treatment, in order for a limited partnership interest to be treated the same as non-voting stock, i.e., non-attributed, is the requirement of insulation language in the partnership agreement. There is no similar requirement for insulating language for non-voting stock, since it is automatically exempted.

ASF's opponents argue that Mr. Beauvais' broadcast interests must result in a diversification demerit, and that his 75% equity interest must result in only 25% integration credit. The ALJ, on the other hand, correctly recognized the non-attribution of Mr Beauvais' equity interest, and awarded ASF the full 100% integration credit. However, for no apparent reason other than the lack of insulation language, which is unnecessary in any event, he found that ASF must suffer a diversification demerit. Mr. Beauvais' interest in ASF is non-attributable. Accordingly, ASF has no attributable interest in his other broadcast interests, and should suffer



no demerit. For the same reason, ASF is entitled to the full integration credit sought by it.<sup>1</sup>

CONCLUSION

None of the arguments raised by the other parties cast any doubt upon ASF's entitlement to the preferences claimed in its Exceptions.

Respectfully submitted,

ASF BROADCASTING CORPORATION

By:

  
James A. Koerner

Its Attorney

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<sup>1</sup>This assumes, of course, that integration credit has any meaning in light of Bechtel v. FCC, No. 92-1378 (D.C. Cir., December 17, 1993).

**CERTIFICATE OF SERVICE**

I, Beverly L. Miller, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P. C., do hereby certify that copies of the foregoing Reply to Exceptions of ASF Broadcasting Corporation were sent this 5th day of January, 1994, via first class mail, postage prepaid to the following:

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Federal Communications Commission  
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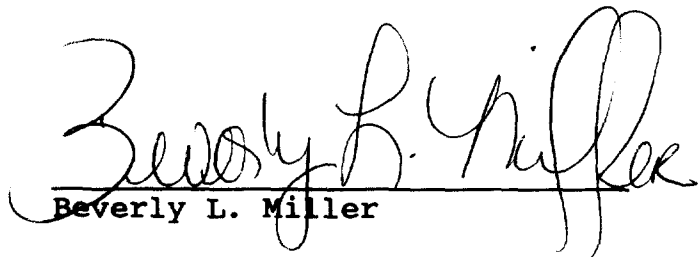
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